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WHO'S TAKING WHAT? PROPERTY RIGHTS, ENDANGERED SPECIES, AND THE CONSTITUTION

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This Article will examine the claim that government regulation of private property for the conservation of endangered species under the federal Endangered Species Act of 1973 ("ESA")¹ triggers a "taking" requiring just compensation under the Fifth Amendment. The concept of "regulatory takings" originated more than seventy years ago in *Pennsylvania Coal Co. v. Mahon*,² with Justice Holmes' oft-quoted statement that government restrictions become takings when they go "too far."³ Since then, the United States Supreme Court and lower courts have struggled to develop coherent, predictable regulatory takings jurisprudence. The Court has undergone several transformations in its interpretation of the takings issue. For a long while, the Court upheld the exercise of the police power with little regard for economic impacts on private property, and granted nearly complete deference to legislative pronouncements of the public good.⁴ Then the Court entered an avoidance phase, declining to determine takings challenges on the grounds that they were not ripe, that administrative remedies had not been exhausted, or that the record was incomplete.⁵ Eventually, however, the social and political landscape began to change, the regulatory state continued to grow, and conservatives replaced liberals on the Court. In this climate, the Supreme Court's regulatory takings jurisprudence began to reflect greater concern for the interests of property owners. Gradually, the Court began to move away from the multi-factor, highly deferential balancing test of *Penn Central Transportation Co. v. New York City*,⁶ towards a single-factor, categorical approach. This transformation started with the "physical invasion" cases, such as *Loretto v. Teleprompter Manhattan CATV*

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1. 16 U.S.C. §§ 1531-1544 (1988 & Supp. V 1993).

2. 260 U.S. 393 (1922).

3. *Id.* at 415.

4. *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (rock quarry); *Miller v. Schoene*, 276 U.S. 272 (1928) (cedar trees); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (brickyard); *Mugler v. Kansas*, 123 U.S. 623 (1887) (brewery). See generally REGULATORY TAKING (G. Richard Hill ed., 1990) [hereinafter REGULATORY TAKING].

5. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Aguins v. City of Tiburon*, 447 U.S. 255 (1980).

6. 438 U.S. 104, 123-25 (1978).

Corp.,⁷ and reached another milestone with the "total takings" rule of *Lucas v. South Carolina Coastal Council*.⁸

Three cases exemplify the Court's movement towards greater protection of private property rights. In *Nollan v. California Coastal Commission*,⁹ the Court struck down a permit condition requiring the owner to grant public access to the beach in exchange for permission to rebuild his bungalow.¹⁰ *Nollan* signalled stricter scrutiny of the nexus between regulatory means and ends. In *Lucas*, the Court held that a regulation denying a property owner all economically feasible use of his property was a per se taking unless the restricted use was not within the bundle of property rights to begin with—for example, a common law nuisance.¹¹ *Lucas* narrowed the "noxious use" exception to takings and created a presumptive right to compensation when the regulation completely destroyed reasonable, investment-backed expectations.¹² Two years later, in *Dolan v. City of Tigard*,¹³ the Court invalidated land use exactions requiring the owner to dedicate a portion of her property as a greenway and bicycle path to help offset flooding and traffic congestion.¹⁴ *Dolan* announced a new "rough proportionality" test for determining the reasonableness of land use controls in relation to the impacts of specific developments.¹⁵

The Federal Circuit, overseeing the Federal Court of Claims, has gone further than the Supreme Court, finding takings in a number of wetland cases, most notably *Loveladies Harbor, Inc. v. United States*¹⁶ and *Florida Rock Industries, Inc. v. United States*.¹⁷ In *Loveladies Harbor*, the Federal Circuit upheld a \$1 million award to a New Jersey developer who was denied a permit under the Clean Water Act¹⁸ to fill 11.5 acres of wetlands out of an original 250-acre tract.¹⁹ By excluding the eighty percent of the parcel that had already been developed, on the ground that it was purchased before the wetlands regulations came into force, the Federal Circuit sought to distinguish *Keystone Bituminous Coal Ass'n. v. DeBenedictis*,²⁰ which requires that the "property as a whole" must be evaluated when determining

7. 458 U.S. 419 (1982).

8. 112 S. Ct. 2886, 2895 (1992).

9. 483 U.S. 825 (1987).

10. *Id.* at 842.

11. *Lucas*, 112 S. Ct. at 2901-02.

12. *Id.*

13. 114 S. Ct. 2309 (1994).

14. *Id.*

15. *Id.* at 2319-20.

16. 28 F.3d 1171 (Fed. Cir. 1994) (en banc), *reh'g denied*, 1994 U.S. App. LEXIS 28462 (Fed. Cir. Sept. 29, 1994).

17. 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995).

18. 33 U.S.C. § 1344 (1988 & Supp. V 1993).

19. *Loveladies Harbor*, 28 F.3d at 1182-83.

20. 480 U.S. 470 (1987).

the economic impact of regulation on only a portion of the entire property.²¹

The issue in *Florida Rock* is more controversial than that considered in *Loveladies Harbor*. In *Florida Rock*, the court proposed a "partial takings" test that would compensate landowners when the government action results in a substantial, but not total, diminution in the value of the affected property.²² The Federal Circuit has also extended the scope of the physical invasion principle to hold that the Environmental Protection Agency ("EPA") committed a taking when it installed a groundwater monitoring well on private property as part of a Superfund cleanup operation.²³

Clearly, these judicial developments have been hailed by property rights advocates across the land. Recent political developments, the new Republican majority in Congress, and the "Contract with America," which would require compensation for rules that reduce property value by even ten percent, indicate that the anti-government forces are gaining strength. The ESA is a priority on a targeted list of environmental laws under evaluation by the 104th Congress. To some, the ESA is the very essence of environmental excess and government abuse.

I come to praise the ESA, not to bury it. It is the most important environmental statute enacted, posing the fundamental question of whether humans can, to paraphrase the National Environmental Policy Act ("NEPA"),²⁴ live in productive harmony with nature. Put more bluntly, are humans intelligent enough to understand that without other species humanity itself will not survive? Whereas NEPA simply declares aspirational goals, the ESA actually demands the achievement of those goals. Indeed, the ESA has a bottom line: species extinction must be avoided "whatever the cost."²⁵ The publication of lists of threatened and endangered species²⁶ permits the ESA to continually track extinction trends of all flora and fauna. The current lists contain nearly 700 domestic species, and another 3000 to 4000 are considered "candidates" for listing.²⁷ Presently, scientists estimate that the worldwide rate of extinction is 1000 species per year.²⁸

Analogous to the lifesaving function of the "miner's canary," the plight of each imperiled species issues a similar warning. The precipi-

21. *Loveladies Harbor*, 28 F.3d at 1180-81.

22. *Florida Rock*, 18 F.3d at 1567.

23. *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991).

24. 42 U.S.C. §§ 4321, 4370(d) (1988 & Supp. V 1993).

25. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 172 (1978).

26. 16 U.S.C. § 1534(a).

27. Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277, 285 (1993); see also U.S. GEN. ACCOUNTING OFFICE, *ENDANGERED SPECIES ACT: TYPES AND NUMBER OF IMPLEMENTING ACTIONS* (1992).

28. EDWARD O. WILSON, *THE DIVERSITY OF LIFE* (1992).

tous decline in the bald eagle population warned about the devastating effects of the continuing use of toxic pesticides on the food chain. The endangerment of the frequently maligned snail darter warned against squandering free-flowing rivers, valuable riparian habitat, and prime farmland in deference to meaningless water projects. The highly controversial and deeply divisive issue of the survival of the spotted owl demonstrated that unsustainable forestry practices on the public and private lands of the Northwest threatened not only ecosystems, but also jobs and communities. Finally, difficult decisions include balancing priorities. For example, the chinook and sockeye salmon in the Snake River, once a great anadromous salmon resource of the Columbia River System, are being sacrificed for the "cheap" power generated by federally operated or licensed hydro-dams.²⁹

Unfortunately, critical warnings frequently go unheeded. Today, the public lands continue to be over-grazed and water supply aquifers continue to be over-pumped. Fisheries are over-harvested, wetlands are drained and filled, and estuaries are being contaminated. In short, ecosystems continue to fragment and decay across the landscape.

Contrary to Rush Limbaugh and the editors of the Wall Street Journal, the ESA does not threaten the economic security or liberty of the Union. In fact, every sober investigation of the ESA has demonstrated that its regulatory requirements have been satisfied without significant conflict.³⁰ Of the thousands of "consultations" that have occurred under section 7, only a handful have become *cause celebres* of the conservative talk show circuit. Although modifications are required to avoid or reduce harm to protected species which may be time-consuming and expensive, facts do not support those who claim the ESA is stifling progress, or confiscating private property. In reality, there has never been a successful takings case brought against the ESA in the two decades it has been in operation.³¹ Claims have been filed, of course, and more are on the way, but as the following discussion will demonstrate, there is little reason to fear a broadscale constitutional attack on the ESA.

The initial point is that the ESA contains provisions that can be utilized to avoid constitutional showdowns. For instance, in the case of threatened species, section 4(d) authorizes the Secretary of the Interior to promulgate a "special rule" allowing some impact on the species in exchange for an agreement among affected landowners to enter into a regional conservation plan.³² One of the most celebrated cases

29. Although there are many causes of the salmon crisis, for example, habitat loss, overharvest, and hatchery problems, the hydropower system causes 80% of the mortality. *Idaho Dep't of Fish & Game v. National Marine Fisheries Serv.*, 850 F. Supp. 886 (D. Or. 1994).

30. Houck, *supra* note 27, at 289.

31. Robert Meltz, *Where the Wild Things Are: The Endangered Species Act and Private Property*, 24 ENVTL. L. 369, 385 (1994).

32. 16 U.S.C. § 1534(d) (1988); 50 C.F.R. § 13 (1989).

involves the California gnatcatcher whose rapidly disappearing coastal sage-scrub habitat just happens to be located in some of the most valuable real estate in Southern California.³³ When the gnatcatcher was listed as a threatened species in 1993, Secretary of the Interior Bruce Babbitt promulgated a special rule providing regulatory relief for developers who participated in California's Natural Communities Conservation Planning Program ("NCCP"), an ongoing effort to develop a multi-species, regional habitat conservation plan to be funded with public and private funds.³⁴ Although obstacles remain, the NCCP has mustered sufficient support, enabling it to achieve significant results.

Another potential source of relief from constitutional challenges is section 10(a), which provides for an incidental take permit ("ITP") based on an approvable Habitat Conservation Plan ("HCP"). An ITP allows land development activities that would otherwise be prohibited as an unlawful "taking" under section 9 of the ESA.³⁵ To increase participation in the HCP process,³⁶ Secretary Babbitt has taken steps to make the HCP process more predictable and "user friendly." One of his first initiatives was to create the National Biological Survey, since renamed the National Biological Service, to create an inventory of biological resources modeled after the U.S. Geological Survey. Secretary Babbitt hoped to avoid the need for heroic measures to rescue declining species, by improving the data base for declining species and taking preventative action. Additionally, Secretary Babbitt's policy commits the government to honor the original terms of HCPs even if circumstances change. For example, if newly listed species are discovered on the permittee's land, the HCP will not be amended to include those species. Both supporters and critics of the process have suggested other changes that could lead to expanded use.³⁷ Whether these provisions are used, of course, will depend on the willingness and ability of property owners to accommodate the needs of the species with which they share their land.

Should all of these options fail, the ESA provides an exemption as a last resort for truly "irreconcilable conflicts."³⁸ Exemptions can be granted by a seven-member, cabinet-level committee, dubbed the "God Squad," following an adjudicatory hearing and the development of a complete record on non-jeopardy alternatives.³⁹ Private parties

33. Charles C. Mann & Mark L. Plummer, *California v. Gnatcatcher*, AUDUBON, Jan.-Feb. 1995, at 38.

34. *Id.*

35. 16 U.S.C. § 1538 (1988).

36. So far, only 150 plans have been submitted.

37. MICHAEL J. BEAN ET AL., RECONCILING CONFLICTS UNDER THE ENDANGERED SPECIES ACT: THE HABITAT CONSERVATION PLANNING EXPERIENCE, WORLD WILDLIFE FUND (1991); Robert D. Thornton, *Searching For Consensus and Predictability: Habitat Conservation Planning Under the Endangered Species Act of 1973*, 21 ENVTL. L. 605 (1991).

38. 16 U.S.C. § 1536(g) (1988).

39. 16 U.S.C. § 1536(h) (1988).

denied federal permits may apply for an exemption, but the standards are strict and transaction costs may be high.⁴⁰ The "God Squad" has convened only twice since the exemption process was created in 1978, and on both occasions the applicant was a federal agency.⁴¹ Still, the existence of the exemption process may constitute an administrative remedy that must be exhausted before a frustrated permit applicant may seek compensation for a taking.⁴²

Another development that could have a dramatic effect on the number of takings claims is the outcome in *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*,⁴³ a case currently pending in the Supreme Court. The question presented in *Sweet Home* is whether the section 9 "take" prohibition applies to habitat modification.⁴⁴ "Take" is defined to mean, inter alia, "harass, harm, pursue, hunt, shoot, wound or kill."⁴⁵ In 1975, the Fish and Wildlife Service promulgated a rule interpreting the term "harm" to mean substantial habitat modification that actually kills or injures listed species by interfering with essential breeding, feeding, or behavioral activities.⁴⁶ This definition was upheld and enforced in *Palila v. Hawaii Department of Land & Natural Resources* ("Palila I").⁴⁷ The rule was then "revised" and upheld again in *Palila v. Hawaii Department of Land & Natural Resources* ("Palila II").⁴⁸

In *Sweet Home*, a panel of the D.C. Circuit initially upheld the validity of the harm regulation. On petition for rehearing, Judge Williams reversed his vote and wrote a 2-1 majority opinion striking down the regulation as ultra vires.⁴⁹ Applying the obscure maxim of *nos-*

40. Applicants must prove that there is "no reasonable and prudent alternative" to jeopardizing the species; that the benefits of proceeding with the action clearly outweighs the benefits of alternative course of action; that the action is of national or regional significance; and that it is in the public interest to proceed notwithstanding possible extinction. 16 U.S.C. § 1536(h)(1)(A) (1988).

41. The committee was first convened in 1979 to consider exemptions for Tellico Dam and Grayrocks Dam. It did not convene again until 1991, to consider an exemption for 44 timber sales found to jeopardize the spotted owl. The author served as counsel to National Wildlife Federation in the Tellico and Grayrocks cases, and as Special Counsel to U.S. Fish & Wildlife Service in the spotted owl proceeding.

42. See *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) (holding that land-use challenge was not ripe because owner failed to apply for a variance); see also *McDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986) (land-use challenge not ripe because owner had sought *maximum* use permit and still had the option of submitting a scaled-down project proposal).

43. 17 F.3d 1463 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 714 (1995).

44. *Id.* at 1464.

45. 16 U.S.C. § 1532(19) (1988).

46. 50 C.F.R. § 17.3 (1975).

47. 639 F.2d 495 (9th Cir. 1981).

48. 852 F.2d 1106 (9th Cir. 1988).

49. *Sweet Home*, 17 F.3d at 1463.

citur a sociis,⁵⁰ Judge Williams found that Congress intended the word "harm" to be limited to the "direct application of force to individual members of a species."⁵¹ In a heated dissent, Judge Mikva attacked the majority's reading of the statute and legislative history, and its departure from the standard of judicial review⁵² announced in *Chevron, U.S.A., Inc. v. Natural Resources Defence Council, Inc.*⁵³ Should the Supreme Court uphold the D.C. Circuit's decision, the regulatory impact of the ESA on private property will be substantially diminished.

Assuming that *Sweet Home* is overturned and that Congress does not eviscerate the ESA in the meantime, the questions of how takings claims might arise and what arguments are there to counter them, present themselves. Given that a facial challenge to either the statute or the regulations would be extremely difficult,⁵⁴ an "as-applied" challenge involving substantial economic deprivation based on reasonable, investment-backed expectations would provide the best vehicle. Such a case might arise in the "owl forests" of the Pacific Northwest where logging on private lands is being sharply curtailed to protect the "home range" of the Northern Spotted Owl; or in the San Joaquin Delta of California where irrigation diversions must be reduced to meet water quality standards recently set for the Delta smelt and the winter run of Sacramento River chinook; or, on the outskirts of Austin, Texas where the golden-cheeked warbler sits in the path of urban sprawl.

I. INVERSE CONDEMNATION/PHYSICAL INVASION

The clearest takings case is one where the government either authorizes or commits a physical invasion. In *Pumpelly v. Green Bay Co.*,⁵⁵ construction of a state-authorized dam flooded plaintiff's property. In *United States v. Causby*,⁵⁶ air traffic from a municipal airport disrupted the chickens on plaintiff's farm. In *Loretto v. Teleprompter Manhattan CATV Corp.*,⁵⁷ the requirement that landlords install a cable television box upon their property for the use of their tenants led to a

50. The meaning of a word may be "ascertained by reference to the meaning of other words or phrases associated with it." BLACK'S LAW DICTIONARY 1060 (6th ed. 1990).

51. *Id.* at 1465.

52. *Sweet Home*, 17 F.3d at 1473-78 (Mikva, J., dissenting). A full discussion of *Sweet Home* is beyond the scope of this Article, except to say that there is ample reason to overturn the panel's decision.

53. 467 U.S. 837 (1984).

54. *Cf. United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985) ("governmental land use regulation may under extreme circumstances amount to a 'taking'"); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (upholding the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201-1328 (1988 & Supp. V 1993)).

55. 80 U.S. 166 (1871).

56. 328 U.S. 256 (1946).

57. 458 U.S. 419 (1982).

takings claim. In the most recent case, *Hendler v. United States*,⁵⁸ a monitoring well was installed by the EPA to measure contaminated groundwater. In contrast, the Court in *PruneYard Shopping Center v. Robins*⁵⁹ declined to find a taking where the invasion, requiring store owners to permit individuals to exercise First Amendment rights, was of a limited and temporary nature.

In some respects, *Nollan*⁶⁰ and *Dolan*⁶¹ may be viewed as physical invasion cases, although alternative grounds were also offered by the Court. In both cases, the challenged government actions would have required the owners to allow public access across their property. In *Nollan*, it was beach access, and in *Dolan*, a bicycle path. The Court emphasized that these actions removed one of the most basic "sticks" from the owners' bundle of rights, the right to exclude others.⁶²

Inverse condemnation will not play a significant role in cases arising under the ESA. The ESA operates by restricting uses, not by requiring physical occupation or public access. In one sense, it restricts owners' ability to "exclude" the unwanted species, for example, a marauding grizzly bear. However, in *Christy v. Hodel*,⁶³ the Ninth Circuit held that this restriction was not a taking. In similar fashion, the Second Circuit rejected an argument by a Vermont ski resort that denial of a land-use permit to construct a snowmaking pond in a deer yard was a taking because it forced the company to provide winter quarters for the deer.⁶⁴

II. ESSENTIAL NEXUS AND ROUGH PROPORTIONALITY

In *Nollan*, the Court struck down a permit condition requiring the owner to grant an easement across his beachfront property.⁶⁵ The Court based its decision on the ground that the condition bore no relationship to the regulatory objective, which was to preserve a view of the ocean for those traveling past the development.⁶⁶ Interestingly, Justice Scalia, writing for the majority, indicated that if the California Coastal Commission had conditioned the need for an easement on access, and supported its position in the record, the condition would have been valid.⁶⁷ Form seems to have once again triumphed over substance.

58. 952 F.2d 1364 (Fed. Cir. 1991).

59. 447 U.S. 74, 83 (1980).

60. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

61. *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994).

62. *Nollan*, 483 U.S. at 831; *Dolan*, 114 S. Ct. at 2316.

63. 857 F.2d 1324 (9th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989).

64. *Southview Assocs. v. Bongartz*, 980 F.2d 84 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1586 (1993).

65. *Nollan*, 483 U.S. at 839.

66. *Nollan*, 483 U.S. at 836.

67. *Id.* at 836-37.

In *Dolan*, the Court invalidated permit conditions requiring the owner to dedicate a portion of her property to a public greenway and bicycle path as mitigation measures to offset the additional parking lot runoff and traffic that the project would generate.⁶⁸ Writing for the majority, Justice Rehnquist determined that, although the prevention of flooding and traffic congestion were legitimate public purposes and there was an "essential nexus" between these purposes and the conditions, these conditions did not satisfy the "rough proportionality" test.⁶⁹ One reason the City of Tigard did not meet this test is that Justice Rehnquist had just invented it. No one knows for sure what the "rough proportionality" test is, but it appears to be more procedural than substantive. All that may be needed is a good record to show that the imposition on the landowner is proportional to the impact the landowner is causing, i.e., that the landowner is not being "singled out" to bear a cost that should rightfully be borne by the public.

The essential nexus and rough proportionality tests will require the government to justify both the efficacy and the equity of specific ESA restrictions on specific property interests. However, this is not such a bad thing, and it should not prove all that difficult. If these steps are followed, neither *Nollan* nor *Dolan* should pose major problems in ESA situations. Both cases involved actual dedications of property, public easements, which are not required by ESA regulations (although they may be agreed to in HCPs). The main message of these cases is that rules appearing to force individuals to bear disproportionate burdens to achieve the common good will have a tough time passing muster with this Court.

III. CATEGORICAL TAKINGS AND BACKGROUND PRINCIPLES

*Lucas*⁷⁰ is the most frequently discussed "takings" case in recent history and certainly, it is *the* case that property rights advocates are relying on to trump the ESA. In *Lucas*, the Court held that when a regulation denies all economically beneficial or productive uses of the land, compensation is due unless the regulated activity was not "previously permissible under relevant property and nuisance laws."⁷¹ At first blush, this appears to be a reaffirmation of the familiar nuisance or "noxious use" exception to takings. Beginning with the Prohibition-Era brewery case, *Mugler v. Kansas*,⁷² the Court repeatedly sustained various uses of the police power on the principle that the prohibited activity constituted a "noxious use."⁷³ Later cases, such as

68. *Dolan*, 114 S. Ct. at 2312-15.

69. *Id.* at 2321.

70. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

71. *Id.* at 2901.

72. 123 U.S. 623 (1887).

73. *E.g., id.* at 669.

*Agins v. Tiburon*⁷⁴ and *Penn Central*,⁷⁵ expanded the "noxious use" principle to uphold regulations that "substantially advance legitimate state interests."⁷⁶ However, in *Lucas*, the majority opinion, effectively rejected the *Mugler* holding, and sought to narrow the "noxious use" exception to when there has been a "total taking."⁷⁷ Justice Scalia indicated that such severe limitations "cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."⁷⁸

The facts of *Lucas* are important to an understanding of this holding. In 1986, David Lucas purchased two residential beachfront lots on a South Carolina barrier island.⁷⁹ At that time, Lucas's lots were not subject to the state's coastal zone building permit requirements and the adjacent lots had all been developed.⁸⁰ In 1988, the state legislature enacted the Beachfront Management Act which barred Lucas from building any permanent habitable structures on his two lots.⁸¹ Lucas sued and the state trial court found that the new law rendered his property "valueless."⁸² The South Carolina Supreme Court reversed on the ground that the proposed development threatened a valuable public resource and was akin to a public nuisance.⁸³

When the case reached the Supreme Court, Justice Scalia determined that the South Carolina Supreme Court had been "too quick to conclude that the [harmful or noxious use] principle decide[d]" the case.⁸⁴ He elaborated:

[t]he "total taking" inquiry we require today will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, the social value of the claimant's activities and their suitability to the locality in question, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike.⁸⁵

Justice Scalia acknowledged that nuisance law was an evolving concept and that "changed circumstances or new knowledge may make

74. 447 U.S. 255 (1980).

75. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

76. *E.g.*, *Agins*, 447 U.S. at 260.

77. *Lucas*, 112 S. Ct. at 2899.

78. *Id.* at 2900.

79. *Id.* at 2889.

80. *Id.*

81. *Id.*

82. *Id.* at 2890.

83. *Id.*

84. *Id.* at 2897.

85. *Id.* at 2901 (citations omitted).

what was previously permissible no longer so.”⁸⁶ In a concurring opinion, Justice Kennedy re-emphasized this point: “[t]he Takings Clause does not require a static body of state property law; it protects private expectations to ensure private investment.”⁸⁷ Justice Kennedy recognized the right of the state to go further than the common law of nuisance to protect a “fragile land system.”⁸⁸ The problem, as both Justice Scalia and Justice Kennedy perceived it, was that the state had acted too late, as far as *Lucas* was concerned, in seeking to protect its barrier beaches. The interesting question is whether the result would have been different had *Lucas* bought the lots after passage of the Beachfront Management Act.

Despite all the controversy surrounding the *Lucas* case, the actual holding is quite narrow and leaves many undetermined issues. In addition to the one just posed regarding the timing of the alleged taking, consider the trial court finding, which the state failed to challenge, that the law rendered the property “valueless.” Although four Justices (Kennedy, Blackmun, Stevens, Souter) found this finding questionable,⁸⁹ the majority gratefully adopted it as the premise for its new categorical rule.⁹⁰ Where residual value is actually litigated, however, such a finding should be extremely rare. Even the most severe environmental restriction leaves some uses, if only recreational, so that rarely, if ever, is the post-regulation value literally zero.⁹¹ Of course, that begs the question of what, exactly, is the nature of the “property” interest affected by the government action. This is the crux of the issue under the ESA, and the next issue to consider.

The essential question is whether wildlife and ecosystem preservation are included within the “background principles” of state and federal law. History, logic, and the public interest all suggest an affirmative response.

In its natural state, wildlife has always been regarded as *ferae naturae*, a part of the commons rather than private property.⁹² Since Roman law, government has been recognized as the trustee of wildlife for the benefit of the public. For a time, states were even characterized as owners of wildlife.⁹³ Modern doctrines imply that the states

86. *Id.*

87. *Id.* at 2903 (Kennedy, J., concurring).

88. *Id.*

89. *See id.* at 2903 (Kennedy, J., concurring in the judgment); *id.* at 2908 (Blackmun, J., dissenting); *id.* at 2919 n.3 (Stevens, J., dissenting); *id.* at 2925 (statement of Souter, J.).

90. *Id.* at 2896.

91. In *Florida Rock*, for example, the Federal Circuit held that evidence of a speculative market in Florida real estate must be admitted to determine whether, despite the regulatory restrictions, there nevertheless were buyers willing to take the chance that the regulations might one day be lifted. *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1565 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995).

92. *Cf.* MICHAEL J. BEAN, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* (1983).

93. *Geer v. Connecticut*, 151 U.S. 519 (1896).

and the federal government share a strong *parens patriae* interest in wildlife conservation.⁹⁴

Since the turn of the century, the federal government has exercised its constitutional authority, under the Commerce, Treaty, and Property Clauses, to enact a series of wildlife conservation laws.⁹⁵ In *Missouri v. Holland*,⁹⁶ the Court upheld the federal waterfowl program established under treaties with Great Britain and Mexico, and Justice Holmes noted that "a national interest of very nearly the first magnitude is involved."⁹⁷ Over the years, Congress has steadily added to the corpus of federal wildlife law, including the Lacey Act,⁹⁸ the Migratory Bird Treaty Act,⁹⁹ the Bald and Golden Eagle Protection Act,¹⁰⁰ the Wild Free-Roaming Horses and Burros Act,¹⁰¹ the Marine Mammal Protection Act,¹⁰² and the ESA.

Wildlife protection measures frequently have been upheld in the face of challenges from private property owners, objecting to prohibitions on the take of certain species that totally eliminated an economic activity.¹⁰³ For instance, in *Kleppe v. New Mexico*,¹⁰⁴ the Court upheld the right of the government to protect wild horses and burros despite claims of damage to private grazing-rights holders. In *Caep-part v. United States*,¹⁰⁵ the Court enjoined the pumping of groundwater on private lands, pursuant to state water rights, because it was having an adverse impact on the endangered Devil's Hole pupfish. In *Andrus v. Allard*,¹⁰⁶ the Court prohibited the sale of Bald Eagle feathers by Native Americans. In *Cerritos Gun Club v. Hall*,¹⁰⁷ the Ninth Circuit upheld hunting regulations that "totally destroyed" the value of investments made on private land. And in *Sierra Club v. Department of Forestry & Fire Protection*,¹⁰⁸ a state court upheld a California agency's denial of permits to harvest timber on private land in the absence of measures to mitigate harm to the threatened spotted owl and marbled murrelet, despite the timber companies' contention that the mitigation rendered the harvests uneconomical.

94. *Hughes v. Oklahoma*, 441 U.S. 332 (1979); *California Trout Inc. v. State Water Resources Control Bd.*, 255 Cal. Rptr. 184 (Cal. App. 1989). See also RUTH S. MUSGRAVE & MARY ANNE STEIN, *STATE WILDLIFE LAWS HANDBOOK* (1993) (listing 32 states with laws asserting public ownership of wildlife).

95. Bean, *supra* note 89, at 10-17.

96. 252 U.S. 416 (1920).

97. *Id.* at 435.

98. 16 U.S.C. §§ 3371-78 (1988 & Supp. V 1993).

99. 16 U.S.C. §§ 703-12 (1988 & Supp. V 1993).

100. 16 U.S.C. §§ 668-668(d) (1988 & Supp. V 1993).

101. 16 U.S.C. §§ 1331-1340 (1988 & Supp. V 1993).

102. 16 U.S.C. §§ 1361-1407 (1988 & Supp. V 1993).

103. *Martin v. Waddell*, 41 U.S. 367 (1892).

104. 426 U.S. 529 (1976).

105. 426 U.S. 128 (1976).

106. 444 U.S. 51 (1979).

107. 96 F.2d 620 (9th Cir. 1938).

108. 26 Cal. Rptr. 2d 338 (Cal. Ct. App. 1993).

Another source of background property principles is the "public trust doctrine," which is relevant to certain ESA cases. The value of the public trust doctrine has been the subject of exhaustive debate.¹⁰⁹ The doctrine continues to survive despite frequent notices of its demise.¹¹⁰ Although largely a product of state law, the scope, content, and effect of the doctrine varies from state to state.¹¹¹ One of the strongest statements of the doctrine is the Mono Lake case,¹¹² in which the California Supreme Court held that the state lacked the authority to grant absolute water rights that would cause significant ecological damage. The California Supreme Court rejected the "takings" challenge, determining that the appropriators could not lose what did not belong to them.¹¹³

From the beginning, the doctrine has protected navigation, commerce, and fisheries.¹¹⁴ Wetlands have been preserved in some states,¹¹⁵ but not in others.¹¹⁶ Over time, other interests have included: wildlife habitat, water quality, recreation, and aesthetics.¹¹⁷ Cogent arguments have been made for including the maintenance of ecological integrity, whether terrestrial or aquatic, within the public trust,¹¹⁸ but to date the Courts have not ventured much beyond the high water mark.

IV. RELEVANT PARCELS AND PARTIAL TAKINGS

The two lower court decisions that pose the greatest threat of a constitutional challenge to the ESA are *Loveladies Harbor*¹¹⁹ and *Florida*

109. E.g., Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631 (1986); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

110. See James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527 (1989); James L. Huffman, *Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines at Work*, 3 J. LAND USE & ENVTL. L. 171 (1987).

111. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 473 (1988) (states may "define the limits of the lands held in public trust and recognize private rights in such lands as they saw fit"), *reh'g denied*, 486 U.S. 1018 (1988).

112. *National Audubon Soc'y v. Superior Court of Alpine County*, 33 Cal. 3d. 419 (Cal.) (en banc), *cert. denied*, 464 U.S. 977 (1983).

113. *Id.* at 452.

114. *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892).

115. *Just v. Marinette County*, 56 Wis. 2d 7 (Wis. 1972).

116. *Bartlett v. Zoning Comm'n*, 161 Conn. 24 (Conn. 1971).

117. *Marks v. Whitney*, 6 Cal. 3d 251 (Cal. 1971) (en banc); *Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 622 (Idaho 1983).

118. See David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Critical Resources*, 12 HARV. ENVTL. L. REV. 311 (1988).

119. *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994) (en banc), *reh'g denied*, 1994 U.S. App. LEXIS 28462 (Fed. Cir. Sept. 29, 1994).

Rock,¹²⁰ both opinions by Judge Plager of the Federal Circuit, involving Corps of Engineers denials of section 404¹²¹ permits to fill wetlands. *Loveladies Harbor* involved a New Jersey developer who had purchased 250 acres in the Meadowlands in the 1950s, long before the advent of the state and federal wetlands programs of the 1970s.¹²² The owners had profitably developed 199 acres of the original tract before applying for a state wetlands permit.¹²³ After a protracted battle, the state issued a permit to develop 12.5 acres, 11.5 of which was wetland, but required the developer to dedicate the balance of the remaining parcel, some 39.5 acres, to a conservation area.¹²⁴ In finding a taking, the Federal Circuit excluded all but the 12.5 acres involved in the permit denial on the grounds that the original parcel had been purchased before the wetlands laws were enacted, and that the "relevant parcel" for purposes of analyzing the impact of the permit denial was what remained to be developed at the time the permit decision was made, i.e., 12.5 acres.¹²⁵

The *Loveladies Harbor* decision disregards the landmark *Deltona*¹²⁶ decision, rendered by the Claims Court over a decade ago, and is inconsistent with the approach taken by the Court in *Penn Central*¹²⁷ and *Keystone*,¹²⁸ both of which held that in calculating the economic impact of a regulation the "parcel as [a] whole" must be evaluated, and if there is value in the unencumbered portion, no taking results. However, *Keystone* was a close (5-4) decision with a vigorous dissent by Chief Justice Rehnquist, who argued that the affected interest (coal deposits left to prevent subsidence) was a separate estate for which compensation was due. There is some speculation that the Federal Circuit may have been anticipating that, with the latest changes in the Court's membership, Justice Rehnquist's view may become the majority. Footnote 7 in *Lucas* hints in that direction.¹²⁹ However, since the government decided not to seek to appeal the decision in *Loveladies*

120. *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), cert. denied, 115 S. Ct. 898 (1995).

121. 33 U.S.C. § 1344.

122. *Loveladies Harbor*, 28 F.3d at 1173-74.

123. *Id.* at 1174.

124. *Id.*

125. *Id.* at 1181.

126. *Deltona Corp. v. United States*, 657 F.2d 1184 (Ct. Cl. 1981), cert. denied, 455 U.S. 1017 (1982).

127. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130 (1978).

128. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987).

129. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2894 n.7 (1992). Justice Scalia stated:

Regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial

Harbor, it may be a while before we find out, and in that case, it would be unfair to the newest members of the Court, Justices Ginsberg and Breyer, to prejudge their views on this complicated subject.

Florida Rock is turning into a wetlands soap opera. It has bounced between the Claims Court and the Federal Circuit for over a decade. The case involves denial of a section 404 permit to mine ninety-eight acres of wetlands for limestone in a buffer zone area near the Everglades.¹³⁰ In its latest decision, the Federal Circuit reversed a key evidentiary ruling by the Claims Court,¹³¹ and remanded the case with the instruction that the lower court apply a "partial takings" analysis to determine whether the company was entitled to compensation.¹³² The partial takings test announced by the court is unprecedented and radical, because owners would be compensated for the diminution in property value based on their reasonable investment backed expectations of the profits to be realized from the prohibited activity. The facts of the case illustrate how radical this approach would be. The company bought the land for about \$2000 per acre in 1972.¹³³ Based on the speculative market evidence that the Federal Circuit found credible, the property has a current value of \$4000 per acre.¹³⁴ However, the value of the limestone makes it worth \$10,000 per acre.¹³⁵ Thus, what the Federal Circuit is saying in its remand is that although the property could be sold at a fifty percent profit, there may nevertheless be a taking because the company will not be able to realize its maximum profit from mining.

The Federal Circuit acknowledged the lack of precedent for this extreme rule of compensation, but cited footnote 6 in *Lucas* as a signal from Justice Scalia that the Court may be inclined, someday, to adopt a "partial takings" position.¹³⁶ The Federal Circuit did acknowledge that a "mere diminution" in value would not constitute a taking, but gave no meaningful standard to measure what would constitute a

use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in the tract as a whole.

Id.

130. The mining company initially sought a permit to mine the entire 1500 acre parcel that it had purchased in 1972. *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1562 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995). However, the Corps rejected the application, stating that it would only process a permit for three years worth of mining, which meant 98 acres. *Id.* at 1563.

131. *Id.* at 1565-67.

132. *Id.* at 1573.

133. *Id.* at 1562.

134. *Id.* at 1563.

135. *Id.*

136. In responding to Justice Stevens' comment that the "total takings" rule was arbitrary because owners who lost 95% of value would recover nothing while those who suffer complete elimination of value recover everything, Justice Scalia remarked: "[t]his analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation." *Lucas*, 112 S. Ct. at 2895 n.8.

compensable "substantial diminution."¹³⁷ Judge Plager did suggest that "[w]hat is necessary is a classic exercise of judicial balancing of competing values," but the scales he describes have a heavy thumb on the property owner's side.¹³⁸

In sum, there has never been a successful takings challenge under the ESA, there are many ways of avoiding one, and conventional takings jurisprudence, though still in flux, does not suggest that ESA restrictions are especially vulnerable. In the vast majority of cases, ESA restrictions do not even approach the total deprivation standard of *Lucas*. Even in the hypothetical case of a total deprivation, an ESA-based restriction may survive based on an analysis of background principles of wildlife preservation and public trust doctrines. As time goes by, landowners may also have difficulty demonstrating the reasonableness of investment-backed expectations in the face of a growing body of scientific evidence and well-publicized accounts on the subject of species endangerment and ecological impoverishment.

On the other hand, if the Court adopts either, or both, of Judge Plager's reductionist theories from *Loveladies Harbor* or *Florida Rock*, the future is bleak for endangered species, as well as for wetlands, greenways, open spaces, scenic vistas, historic and archeological treasures, and virtually any other regulatory program that seeks to protect natural or cultural resources on private land. By its very nature, this type of regulation zeros in on a specific use of land and inevitably removes whatever economic value can be gained through destruction of that feature.

The reason regulations are created in the first place is to counterbalance market forces that do not reflect, or respect, the values that regulations seek to protect: biological diversity, ecological health, the beauty and wonder of the world in which we live. These are difficult choices. It is not possible to simultaneously maximize profit and yet preserve biological diversity on the same landscape. Development, good jobs and a decent standard of living are all attainable goals, but long term sustainability, requires taking care of the land. Restraint is essential. It is absurd to indulge every demand, consume resources and dump wastes without recognizing the limits that the natural world can supply and assimilate. One does not have to subscribe to fatalistic scenarios to entertain doubts about the sustainability of a civilization that is causing a rate of extinction unequaled since the time of the dinosaurs.¹³⁹

In determining that property owners are entitled to compensation whenever a government regulation substantially diminishes the value of their property, as measured by the owners' expectations of the

137. *Florida Rock*, 18 F.3d at 1571.

138. *Id.* at 1570.

139. EDWARD O. WILSON, *THE DIVERSITY OF LIFE* (1992).

profits to be realized from the regulated activity, Judge Plager is in effect saying there is a constitutional right to eradicate species, even entire ecosystems, from the face of the earth, regardless of the social, economic, and environmental consequences. The rejoinder that all government has to do to avoid this is to pay "just compensation," meaning "top dollar," is specious. How many billions would such a program cost? Why should the public have to pay someone not to do something harmful? And who in Congress will propose the first endangered species tax? Let's be honest about it: if government has to pay market value to get real estate developers to stop destroying coastal sage scrub habitat in Southern California, we can kiss the gnat-catcher and the rest of its biological community goodbye.

V. A WAY OUT

Some of the complaints that landowners have about the ESA are valid, and in fact are problems that impede the law's conservation goals. The ESA asserts its role too late, when species have already entered a freefall, crisis situation. Because the damage is already significant, recovery takes time and the divisive conflicts resolve too slowly. The HCP process is slow, unpredictable and too costly for small landowners. However, these difficulties can be remedied through carefully crafted legislative, administrative changes and of course additional resources would help.

The most significant problem with the ESA is that it provides almost no incentives for private parties to want species to inhabit their lands, let alone take affirmative action to conserve habitat. Nearly everyone agrees that some package of economic incentives makes sense. Ideas that have been suggested include a Biodiversity Trust Fund, habitat mitigation banks, transferable development rights, and insurance policies.¹⁴⁰ The first, albeit modest attempt in this direction, was a special fund established by Defender of Wildlife, a nonprofit group, to compensate ranchers for stock lost to wolves.

Of course, like most good ideas, these all cost money. Some of this money could be raised through fees and private donations. In some cases, such as the Habitat Transaction Method being tried in Southern California,¹⁴¹ the development community may be willing to fund market-based solutions as an alternative to spending their money on litigation against the government. Other ideas, such as the Biodiversity Trust Fund, which would finance measures such as conservation

140. See generally DEFENDERS OF WILDLIFE, BUILDING ECONOMIC INCENTIVES INTO THE ENDANGERED SPECIES ACT (Wendy E. Hudson ed., 1993) [hereinafter DOW Report]; *Endangered Species Act—Incentives to Encourage Conservation by Private Landowners: Hearings Before the Subcomm. on Environmental and Natural Resources of the House Comm. on Merchant Marine and Fisheries*, 103d Cong., 1st Sess. (1993).

141. DOW Report, *supra* note 140, at 27-36.

easements, will probably require the dreaded "T" word, as in taxes on real estate transfers or severance taxes on timber harvesting.¹⁴² As unpalatable as such measures may seem, they may actually save money and can honestly be seen as investments that will increase our overall wealth over time.

CONCLUSION

Years ago, the late Professor Donald Hagman coined the term "windfalls for wipeouts" to describe his proposal for resolving takings conflicts.¹⁴³ His idea was that government should recapture some of the wealth it creates through public investment; in roads, sewers, airports, construction, that increase the value of private property served by such facilities. This money, representing a portion of the "windfall" enjoyed by the owner of the benefitted property, would be placed in a fund used to compensate other owners whose property was taken through inverse condemnation or regulatory action. In this way, the "benefits and burdens of citizenship" could be spread more equitably. Though never actually practiced, it was a good idea then, and it may be an even better idea today.

It is infinitely worse to use the Constitution to batter the ESA, a law that, although perhaps out of favor today, can serve well.

142. *Id.* at 101-07.

143. DONALD G. HAGMAN & DEAN MISZYNSKI, *WINDFALLS FOR WIPEOUTS* (1978).